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Debtor and Creditor--Fraudulent Conveyance--Annulled Marriage as Failure of Consideration (American Surety Co. v. Conner, 251 N.Y. 1 (1929))

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DEBTOR AND CREDITOR — FRAUDULENT CONVEYANCE — ANNULLED MARRIAGE AS FAILURE OF CONSIDERATION.—The manager of a savings bank had stolen, over a period of years, various sums of money from the bank's funds. In consideration of her promise to marry him, he gave to the other defendant in this action certain real property and jewelry which he had bought. He was later sentenced to state's prison and the marriage was annulled at the instance of the wife on the ground of fraud. Plaintiff indemnified the bank for its loss and was substituted by assignment to its rights and remedies. In an action against the manager and his former wife, the Special Term dismissed the complaint; the Appellate Division reversed and directed judgment for the plaintiff, setting aside the conveyance and transfer by the manager to his wife as fraudulent in law against creditors of the husband; the annulment having rendered the marriage void *ab initio*, there was no consideration for the conveyance and transfer. On appeal, *held*, judgment of Appellate Division reversed and that of Special Term affirmed. *American Surety Co. v. Conner*, 251 N. Y. 1, 166 N. E. 783 (1929).

The effect of the provisions of the Debtor and Creditor Law was to abrogate the ancient rule whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance.¹ The annulment of the marriage was not conditioned upon a return of the benefits received. A husband suing a wife after annulment of marriage to recover property parted with in consideration of marriage, on the ground of failure of consideration, is subject to the general rule that recovery for failure of consideration is governed by equitable principles.² The decree of annulment destroyed the marriage from the beginning as a source of rights and duties,³ but it did not affect the independent and separate contract under which the property was conveyed.⁴ The husband, being the wrong-doer, and it being impossible to place the wife in a condition in which she would have been but for her performance of her part of the contract, could not have obtained relief had he sued to reclaim what he had parted with.⁵ The principle underlying these cases is that the plaintiff may not prevail if he fails to satisfy the Court that what the defendant

¹ *Marcus v. Kane*, 18 F. (2d) 722 (C. C. A. 2d, 1927); *Morse v. Roach*, 229 Mich. 538, 201 N. W. 471 (1924); *Lipskey v. Voloshen*, 155 Md. 139, 141 Atl. 402 (1928).

² 3 Williston, Contracts, Secs. 1457, 1530; see *DeKay v. Bliss*, 120 N. Y. 91, 24 N. E. 300 (1890); *Kley v. Healy*, 127 N. Y. 555, 561, 28 N. E. 593 (1891).

³ *Matter of Moncrief*, 235 N. Y. 390, 397, 139 N. E. 550 (1923); *Jones v. Brinsmade*, 183 N. Y. 258, 76 N. E. 22 (1905).

⁴ 3 Williston, Contracts, *supra*.

⁵ *Rubin v. Joseph*, 215 App. Div. 91, 213 N. Y. Supp. 460 (1926); *P. v. P.*, L. R. (1916) 2 Irish Rep. (K. B.) 400, 414; *Ring v. Ring*, 127 App. Div. 411, 412, 111 N. Y. Supp. 713, *aff'd* 199 N. Y. 574, 93 N. E. 1130 (1910).

has received should in conscience be returned.⁶ It necessarily follows that the creditors have no greater right than the husband.

E. J. D.

HUSBAND AND WIFE—DIVORCE—RIGHT TO ALIMONY UPON ANNULMENT OF MARRIAGE.—In a decree of divorce, the defendant herein was directed to pay alimony to the plaintiff so long as she remained unmarried. Thereafter plaintiff contracted a second marriage which was annulled on the ground of fraud. This action was brought to recover the instalments of alimony falling due since her remarriage. On appeal, *held*, plaintiff is entitled to alimony from the time the second marriage was adjudged null and void but not for the period during which the second marriage was in force. *Sleicher v. Sleicher*, 251 N. Y. 366, 167 N. E. 501 (1929).

The basis of the decree of annulment was the fraudulent concealment from plaintiff of insanity prior to and including the time of marriage.¹ Plaintiff urges that the right to alimony revived when the second marriage was annulled for fraud avoiding it from the beginning.² The purpose of an award of alimony is support for a divorced wife not otherwise supported. Though a decree of annulment of a voidable marriage relates back to the time of the ceremony, support cannot be had from two spouses at the same time.³ During the continuation of the voidable marriage the husband is chargeable with a duty of suitable support and it is presumed that that duty is fulfilled.⁴ The annulment of a marriage is not retroactive to the extent of making the divorced husband liable for alimony during the time the voidable marriage is in force.⁵

J. M. C.

⁶ *Schank v. Schuchman*, 212 N. Y. 352, 358, 106 N. E. 127 (1914); 3 Williston, Contracts, Sec. 1530.

¹ *Smith v. Smith*, 112 Misc. 371, 184 N. Y. Supp. 134 (1920); *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120 (1904); *Lapides v. Lapides*, 224 App. Div. 257, 229 N. Y. Supp. 745 (1928).

² *Matter of Moncrief*, 235 N. Y. 390, 139 N. E. 550 (1923); *American Surety Co. v. Conner*, 251 N. Y. 1, 166 N. E. 783 (1929).

³ *Sistare v. Sistare*, 218 U. S. 1, 22, 30 Sup. Ct. Rep. 682, 54 L. ed. 905 (1909); *Krauss v. Krauss*, 127 App. Div. 740, 111 N. Y. Supp. 788 (1908).

⁴ *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267 (1906); *Phy v. Phy*, 116 Or. 31, 236 Pac. 751 (1925); *Nelson v. Nelson*, 282 Mo. 412, 221 S. W. 1066 (1920).

⁵ *Jones v. Brinsmade*, 183 N. Y. 258, 76 N. E. 22 (1905); *Matter of Moncrief*, *supra*.